

No. 10217

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

KENNETH R. GREENWOOD, ADMINISTRATOR OF THE ES-
TATE OF CHARLES H. GREENWOOD, DECEASED,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
HELEN R. CARLOSS,
MURIEL PAUL,

Special Assistants to the Attorney General.

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PAUL P. O'BRIEN

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OPINION BELOW

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 16-33) which is reported in 46 B. T. A. 832.

JURISDICTION

This petition for review (R. 35-39) involves federal estate tax for the year 1939. On July 27, 1940, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of \$16,823.49. (R. 8-13.) Within ninety days thereafter and on September 27, 1940, the taxpayer filed a petition with the

Board of Tax Appeals for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code. (R. 3-13.) The decision of the Board of Tax Appeals sustaining the deficiency was entered May 29, 1942 (R. 34), and a deficiency determined (as corrected by stipulation) in the amount of \$18,501.28 (R. 16). The case is brought to this Court by a petition for review filed June 29, 1942 (R. 39), pursuant to provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the decedent and his wife transmuted his separate property into community property and therefore only one-half of its value is includible in his gross estate, or whether it remained his separate property or was owned by the spouses as joint tenants and therefore its total value is includible in his estate under Section 302 (a) or (e) of the Revenue Act of 1926.

STATUTES INVOLVED

A. B. O. & S. 8/1/42
Revenue Act of 1926, c. 27, 44 Stat. 9: *(inserted)*

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other

person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

Revised Code of Arizona (1928):

265. *Joint account between husband and wife; payment to survivor.* Whenever a husband or wife open a joint account with any bank, and either one dies, such bank shall pay to the sur-

vivor the amount standing to their joint credit, and upon making such payment such bank shall be released from all further liability for such amount.

986. *Right of survivorship abolished.* Where two or more persons hold property jointly and one joint owner dies before severance, and the grant or devise does not expressly vest the estate in the survivor, the interest in the estate of the owner dying shall not survive to the remaining joint owners but shall descend to the heirs of the deceased joint owner as though his interest had been severed and ascertained.

2173. *Separate property; separate earnings of wife and children.* All property, both real and personal of the husband, owned or claimed by him before marriage and that acquired afterward, by gift, devise or descent, as also the increase, rents, issues and profits of the same, shall be his separate property, and all property, both real and personal of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, as also the increase, rents, issues and profits of the same, shall be her separate property. The earnings and accumulations of the wife and her minor children in her custody while she has lived or may live, separate and apart from her husband, shall be the separate property of the wife.

STATEMENT

The facts as found by the Board of Tax Appeals may be summarized as follows:

The decedent, formerly a resident of the State of New York, moved to the State of Arizona in 1927 where he and his family resided until his death in 1939. (R.

16-17.) Upon moving to Arizona the decedent retired from all business activities and thereafter received no property from any occupation or employment. (R. 17.)

It was established that the estate of the decedent consisted of his originally separately acquired property, part of which consisted of his earnings prior to moving to Arizona and part an inheritance from his mother, the amount of the latter not shown in the record. (R. 20, 24.)

The decedent had established bank accounts in Arizona in which he alone made deposits. (R. 17.) Two of these were with a Tucson bank and both decedent and his wife signed the signature cards and either could draw on the accounts. The checking account was made to the credit of "Greenwood, C. H., or Albertine, Either or Survivor of Either". (R. 17-18.) Dividends on stock owned by the decedent were regularly deposited in this account and the decedent checked upon it in buying securities. (R. 18.) The savings account was made to the credit of "Greenwood, C. H., or Albertine". (R. 19-20.)

The decedent and his wife also rented a safe deposit box under a written contract, which provided " * * * hereby declare and represent that we own as joint tenants, with the right of survivorship, all the property of every kind or character now within said box and that all property which may be deposited therein by either or any of us shall be and is owned by us as such joint tenants". This contract is more fully set out in the Board's findings of fact. (R. 18-19.)

Decedent provided his wife a monthly allowance for

household expenses, making these payments to her himself. In his absence she issued checks on the checking account in the usual amount, and on a few occasions issued other checks in his absence. (R. 20.)

Upon the death of decedent the estate tax return listed assets valued at \$240,956.99. Of these, \$179,188.30 represented stock and bonds contained in the safe deposit box; \$26,708.31 represented deposits in banks, of which \$4,320.01 was in the savings account in the Tucson bank, in the name of "Greenwood, C. H., or Albertine", and \$3,553.52 was in the checking account in the name of "Greenwood, C. H., or Albertine, Either, or Survivor of Either"; and the remainder, \$18,834.78 represented savings accounts in decedent's name alone, in cities in Massachusetts, California and Arizona. (R. 19-20.)

The Board found as a matter of fact that the decedent referred to his property as being "half hers" and also referred to it as "community" property. (R. 21-23.) The Board also found that it was the wife's "understanding that half of the ownership of the bank accounts was hers, * * *". (R. 21.)

The administrator of the estate reported the property as community owned and the Commissioner computed the gross estate without allowing a deduction of one-half as returned under the claim of community property. (R. 23.)

The Board of Tax Appeals sustained the Commissioner on the ground that the decedent had established the ownership "jointly" with his wife rather than in "community" ownership.

SUMMARY OF ARGUMENT

Even if under Arizona law husband and wife may transmute the husband's separate property, acquired in another state, to community property of both spouses by their mutual understanding and intention to do so, the husband and wife in the case at bar cannot be held to have done so in the face of written agreements expressing their mutual understanding and intention to establish a joint tenancy. And this is true, even if, under the law of Arizona, the written agreements failed to establish a joint tenancy. The failure of the one would not establish the other in substitution thereof. As the Board of Tax Appeals found the evidence submitted insufficient to indicate community ownership, the property in question was either held in joint tenancy and includible in the husband's gross estate under the Revenue Act of 1926, Section 302 (e), or it remained the separate property of the husband throughout and includible in his gross estate in any event under Section 302 (a) of the Revenue Act of 1926.

ARGUMENT

I

Taxpayer has not shown that the decedent and wife transmuted his separate property into community property by an oral understanding and intention

It is not disputed that the property here involved was originally the separate property of the decedent. It is also not disputed that if the wife at any time acquired an interest in such property, she did so without having furnished any consideration for such interest. It is clear, therefore, that if no change in owner-

ship had been made up to the time of the decedent's death, or if the property were then held by the decedent and his wife as joint tenants with the right of survivorship, the total value of the property is required to be included in the decedent's gross estate. Section 302 (a) and (e) of the Revenue Act of 1926, *supra*. The petitioner does not contend otherwise, but argues that the ownership of the property had been converted into community ownership by mutual understanding and intention.

The Board has found that regardless of whether a husband and wife residing in Arizona may transmute the separate property of the husband into community property by oral agreement, there is, in this case, no sufficient showing of such a change to community ownership.

Counsel for petitioner states in his brief (p. 9), Point IV, that under the law of Arizona, where either husband or wife has separate property and it is their *intention* to treat such property as the community property of both, it becomes community property in accordance with their intention. Counsel also states that the laws of California and Washington may be taken as the law of Arizona on this point. We do not believe that the courts of either of those states have determined that intention alone is sufficient. In support of this point taxpayer cites *Estate of Kelsch*, 203 Cal. 613, 265 Pac. 214, 215. But the *Kelsch* case does not say that mere "intention" is sufficient. It says that a "mere verbal agreement" is sufficient. *Estate of Wahlefeld*, 105 Cal. App. 770, 288 Pac. 870, is also quoted (Br. 11) as authority for the fact that where

there was a meeting of the minds, either spoken or written words were sufficient. But that court found as a fact that there was a meeting of the minds and also that there was a fully executed oral agreement. Again in *Estate of Sill*, 121 Cal. App. 202, 204-205, 9 Pac. 2d 243, the appellate court held that an oral agreement or understanding need not be in any particular words "as long as it may be fairly inferred from all of the circumstances in evidence that a community interest was intended by the parties."

The decision of the Arizona court in *Rundle v. Winters*, 38 Ariz. 239, 245, 298 Pac. 929, does not as the petitioner contends stand for the principle that a husband and wife in Arizona may convert separate property into community property by merely having an intention to do so. That case involved the question whether the wife had a community interest in certain real estate and the facts disclosed that the separate funds of the husband and community funds derived from the operation of a business had been so commingled that it was difficult to state whether the property was purchased with separate or community funds. The court invoked the rule that when separate and community funds are commingled, the commingled funds are presumed to be community property, and it was in that connection that the court stated that when spouses have treated the income from their separate property as community income and it is their intent that it should become community property, the character of the income changes in accordance with their intention.

There has been no commingling of funds in this case. Neither the husband nor the wife had any personal

earnings of any kind subsequent to their change of domicile to Arizona, and all of the property here involved, consisting either of securities or bank accounts established with the income from the securities, is traceable to the separate ownership by the husband at the time that the Arizona domicile was established. Obviously, the deposit, of the income from the securities, in a joint bank account or in an account standing in the husband's name alone, affords no indication of an intent to change the status of either the income or the securities from separate property to community property.

The cases on which the petitioner relies are distinguishable from the case at bar on the simple, unescapable fact that in this case the Board was unable to find that the circumstances in evidence fairly supported the conclusion that the parties had established or had intended to establish community ownership. In none of the cases relied upon by the petitioner were the courts asked to balance comments of the parties in conversation against their clearly expressed written commitments. Cf. *Young v. Young*, 126 Cal. App. 306, 14 Pac. 2d 580. In the case at bar, the parties agreed in writing that the joint renting of the safe deposit box in which their securities were deposited should mean that they owned as joint tenants with the right of survivorship all of the property of every kind or character then within the box and all property which might subsequently be deposited therein. They had also agreed in writing that their checking account in the Tucson bank should be a joint account, payable to either or the survivor, and that the savings bank account in Tucson should be a joint account, subject to check by either.

All of the property here involved is clearly covered by one of these agreements.

As the Board stated in its opinion, there is no evidence indicating that the bank accounts in Massachusetts, Phoenix, Arizona, and Los Angeles, California, were covered by any separate agreement between the parties. Rather, the evidence was that *all* of the decedent's assets, including documents of title and certificates, were in the safe deposit box. In any case, it is a fair inference either that these accounts continued to be separate property, or that the other agreements placed this property in the same category with the rest.

Assuming, however, that the law of Arizona permits a complete change of character of property by a showing of vague references which might apply equally to other forms of ownership, we find no case holding that even a clearly established oral agreement takes precedence over the terms of a written agreement to the contrary. Certainly such statements as were relied upon here should not do so. As the Board pointed out, references to community ownership by the husband and wife may well have been attributable to the fact that in their minds, as laymen, any form of joint ownership in Arizona was *called* community ownership.

We submit that the general law of contracts prevails and the burden of showing that the written agreements were not what they purported to be would rest heavily on the parties or party who disclaimed it. The petitioner here not only had the burden of proving that an oral agreement for community ownership had been made but also that the written agreements did not mean what they purported to mean and that the oral agreement controls.

The Board of Tax Appeals has concluded that there was not a sufficient showing of the establishment of a community estate to overcome the presumption of correctness of the Commissioner's determination as to the ownership of the property. (R. 33.) The evidence submitted to the Board is not incorporated in the record so that the court's inquiry is confined to a determination as to whether, on the basis of the facts found by the Board, a contrary conclusion was necessarily required.

II

The property was either the separate property of the decedent or property held by the decedent and his wife as joint tenants: Hence the total value is required to be included in his gross estate under Section 302 (a) or Section 302 (c) of the Revenue Act of 1926

Whether or not the parties created a technical "joint tenancy" under the laws of Arizona, the fact remains that there was insufficiency of proof that they created a "community" interest.

Whether "joint tenancy" is favored or disfavored in Arizona is not determinative of what these parties did or tried to do. The type of proof offered which precludes claims of community ownership in California is relevant in the State of Arizona, particularly in view of the fact that the taxpayer has urged that we look to the laws of California and Washington generally in the absence of any material amount of litigation before the Arizona courts. California has held that written agreements as to safe deposit boxes and joint bank accounts similar to those here in question precluded claims of community ownership. *Estate of McCoin*, 9 Cal. App. 2d 480, 50 Pac. 2d 114; *Estate of Harris*, 169 Cal. 725, 147 Pac. 967; *Estate of Gurnsey*, 177 Cal.

211, 170 Pac. 402; *Young v. Young*, 126 Cal. App. 306, 14 Pac. 2d 580.

Even if an Arizona court were to hold that in the present case a joint tenancy could not legally be created it does not follow that something else entirely foreign to the written words of the parties was created. The agreements indicate an intention to create a joint tenancy and are inconsistent with any other intention.

The word "survivorship" is not beyond the average layman, even though the technicalities of the various legal tenancies in property may be. Survivorship is entirely foreign to the concept of community ownership, yet the parties here emphasized it.

The petitioner argues that joint tenancies in personal property are no longer legal in the State of Arizona. He points out that Section 1102 of the Revised Statutes of 1913 provided merely that where one joint owner dies before severance, his interest in the joint estate shall not survive to the remaining joint owners but shall descend to and be vested in the heirs and legal representatives, and that Sections 4708 and 4709 authorized the creation of joint tenancies in real property notwithstanding Section 1102. He argues that Section 986 of the 1928 Arizona Code providing that the right of survivorship be abolished where the grant or devise does not expressly vest the estate in the survivors, was based on Section 1102 and that since Section 986 uses the words "grant or devise", real property only is referred to.

Unless, however, a state statute specifically prohibits establishment of joint tenancies the general weight of authority indicates that they will be recognized, and

certainly in those states which permitted them by statute and failed to abolish them altogether. It is said in 33 Corpus Juris 900, at page 901:

* * * These statutes generally merely abridge or abolish joint tenancy with its incident of survivorship as it existed at common law, and do not prohibit or otherwise affect a joint tenancy, with the right of survivorship where the will, deed, or other instrument by which the estate is created, expressly declares or by necessary implication shows an intention to create such an estate, * * *.

It would seem that the State of Arizona has followed this general pattern in abolishing the right of survivorship in Section 986 of the Arizona Code.

The Supreme Court of Arizona, in *Estate of Sullivan*, 38 Ariz. 387, 393, 300 Pac. 193, said: "We should therefore presume that when a word, a phrase, or a paragraph from the 1913 Code is omitted from the Code of 1928, the intent is rather to simplify the language without changing the meaning, than to make a material alteration in the substance of the law itself." Under this interpretation it seems fair to reason that Section 986 of the 1928 Code did not abolish joint tenancies in personal property merely by use of the words "grant or devise," but that it abolished the right of survivorship in either personal or real property unless the estate were expressly vested in the survivor by terms of the instrument creating the tenancy.

In the case at bar, the agreement with respect to the safe deposit box and the agreement with respect to the checking account specifically provided that the survivor should take all. Hence, as to most of the property here

involved, there is no reason to assume that the wife could not have taken as survivor. The taxpayer argues that if the rental agreement is the grant within the meaning of the statute, it would follow that upon the removal of the certificate from the box, there would be a change in the title of the property, since oral joint tenancy could not exist under Arizona law, and all of the certificates and other documents have title in the name of the decedent alone. It may be that the agreement would govern even after the certificates were removed, but in any case, there is no basis for the theory that their removal would convert the certificates into community property, as distinguished from jointly owned property or the husband's separate property. They had not been acquired with community funds, and there was no agreement that they should be converted into community property upon their removal. In any case, we are concerned with securities in the box at the time of the decedent's death and as to them the written agreement controlled.

It should also be noted that in so far as the joint bank accounts are concerned, Section 265 of the Revised Code of Arizona (1928) provides that when a husband and wife open a joint account with any bank and either one dies, such bank shall pay to the survivor the amount standing to their joint credit. Hence, it does not appear that Section 986 has any application to the joint bank accounts here involved, and as to them the wife would take by survivorship.

But regardless of the law of Arizona as to joint tenancies, it is to be emphasized that under the facts of this case no presumption that a community estate was created or intended to be created can arise.

The taxpayer agrees that the property in question was originally the separate property of the husband. A "sizeable" portion of it was inherited and the rest was acquired as separate property before they became domiciled in Arizona. By the law of Arizona property inherited by one spouse is separate property, even though it be inherited during coverture while a resident of that state. Surely then, great care should be exercised in imputing an intention to spouses which their written agreements belie. In any event, if this Court does not find that the spouses did transmute the husband's separate property to community property it is unnecessary to determine whether they did or could create the attempted joint tenancy as the whole of the property would be includible in the husband's gross estate under Section 302 (a).

CONCLUSION

It is submitted that the Board of Tax Appeals was correct in its conclusion that the oral understanding relied upon by taxpayer was insufficient to overcome presumption of correctness of the Commissioner's determination. Its decision should, therefore, be affirmed.

Respectfully submitted,

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,

HELEN R. CARLOSS,

MURIEL PAUL,

Special Assistants to the Attorney General.

NOVEMBER, 1942.